

PROBLEMATIZING PRO BONO

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INTRODUCTION

The current pro bono literature breaks down into two broad categories. The first is purely hortatory, and while its normative arguments are interesting, they are largely aspirational and thus unhelpful for understanding what is *actually* going on in the pro bono world and *why*. The second category, on the other hand, purports to be descriptive and claims to offer potential insights into pro bono practice, but in reality comes nowhere close to giving the full story. The purpose of this essay is to problematize current understandings of pro bono patterns and to lay the groundwork for further research into this all-important area of the American legal community.

The current understanding of pro bono legal practice is superficial and amounts only to broad-brush descriptions and anecdotal evidence. The normative theory for pro bono boils down to “we should have more of it,” while all of our “hard” data are found in general purpose legal periodicals, such as *The American Lawyer* magazine, and cursory reports from the American Bar Foundation. The under-theorized normative literature and the under-empiricized descriptive literature combine to produce an incomplete picture of the pro bono world.

Thus, at one level, this paper criticizes the lack of sophistication and analytical rigor underlying current reports on pro bono practices. But the problem is even more complicated, and the literature’s failings run much deeper: we also point out that no one has previously attempted to integrate the pro bono data (woefully inadequate as it may be) with the data and theories underlying the parallel literature on changing career paths in the American legal community. Lawyers today are more mobile than ever before. The changing dynamics of law-related workplaces present new and exciting opportunities for

the delivery of *tomorrow's* legal services, but the state of flux in the private bar also makes it harder (and more important) than ever to get a firm grasp on *today's* empirical realities. The interaction between these two variables—pro bono patterns on the one hand, and changing career paths on the other—may shed new light on pro bono in American legal circles. Only *after* we understand the way the world is can we intelligently begin our debates and plans for how to change it.

Accordingly, this essay proceeds as follows. In Part I, we describe the current descriptive pro bono literature. In Part II, we describe the current literature on lawyers' changing career paths. In Part III, we analyze and integrate the data from Parts I and II. We will demonstrate that there is an incredible amount of information that we simply do not have. We attempt to pose questions the answers to which we believe are crucial in order to understand how pro bono practice in the United States is structured. We believe that normative proposals for pro bono reform can be made more effective by developing answers to questions we present, and we hope that this analysis will spur future research agendas that attempt to fill the gaps we identify. In essence, we believe that problematizing our understanding of the provision of pro bono service is a necessary step in framing a better model of pro bono practice.

I. PRO BONO'S EMPIRICAL WASTELAND

Today, more than ever, students flock to law schools in hopes of laying the groundwork for careers in public interest.¹ Unfortunately, what starts for many students

1. See, e.g., Jill Andresky Fraser, *Fighting for the Right to Communicate*, N.Y. TIMES, July 13, 2003, at C31 (describing the modern spirit of public-interest students on America's law school campuses and attributing the increase in students' dedication to pro bono service to, *inter alia*, the terrorist attacks of Sept. 11, 2001); Greg Winter, *Legal Firms Cutting Back On Free Services for the Poor*, N.Y. TIMES, Aug. 17, 2000, at A1 (noting that "[m]any of nation's biggest law firms have sharply reduced pro bono work, falling

as a lightning rod for excitement and enthusiasm for the law wanes in the years after graduation, as hardened young lawyers saddled with debt resign themselves to more lucrative jobs far afield from the career paths they envisioned when they first contemplated a legal education. Still, the pro bono literature seems to suggest that within a range of corporate contexts, vibrant pro bono opportunities endure and that a number of attorneys stay true to their original commitments by dedicating their talent and time to these worthy causes.²

But underlying the private bar's self-congratulatory hubris lies a nettlesome question: is there really any *meaningful* pro bono service behind the Am Law 100's laudatory façade? Pro bono reports invariably take the form of broad-brush statistical aggregations and "top ten" lists that rank law firms against their competitors according to their total annual allotments of pro bono hours, or the average number of pro bono hours per practicing attorney.³ However, not all pro bono hours are created equally: an hour spent reading background information on a client's case is different from an hour spent in heated settlement negotiations. Moreover, an hour spent preparing high-tech trial exhibits at a large, well-heeled law firm in New York City (which has seemingly endless

far below professional guidelines for representing people who cannot afford to pay," and, as a result, "law schools and bar associations nationwide" have been forced to fill the void); Tamar Lewin, *At the Bar; The Patron Saint of the Homeless Says He's Had Enough of the Big-City, Big-Firm Life*, N.Y. TIMES, Aug. 28, 1992, at B6 (describing highly paid attorneys in New York City who have left lucrative private law practices to form nonprofit pro bono clinics, which, *inter alia*, recruit law students into careers in public service).

2. See, e.g., Heather Smith, *A Winning Formula*, AM. LAWYER, Oct. 1, 2004 (describing one fourth-year associate, who "says she chose Arnold & Porter specifically for its pro bono commitment. [She] has an ongoing role, along with a partner and two other associates, advising NARAL Pro-Choice America, an advocacy group); Elizabeth Amon, *Building a Better Model*, AM. LAWYER, Sept. 1, 2004 (describing attorneys at Latham & Watkins in Los Angeles and Washington, D.C. who spend 50-100% of their time on pro bono and lauding the result: over three years, "Latham won more than a dozen awards for its pro bono work; in 2003 the firm logged more pro bono hours than any other firm in the country.").

3. See, e.g., *The Am Law 200's Pro Bono Powerhouses and Laggards*, AM. LAWYER, Sept. 1, 2003, at 98 (ranking firms according to their "average pro bono hours per lawyer" and "percentage of lawyers with more than 20 hours").

resources to pour into its pro bono cases) is different from an hour spent drawing charts by hand at a small firm in Des Moines. A partner (who has been out of law school for a decade or more) can presumably get much more accomplished during an hour spent preparing for depositions than can a junior associate who has never before faced a hostile deponent (much less set foot in a courtroom). And an hour spent arguing a habeas appeal for a death row inmate is not necessarily equal to an hour drafting a consent decree in a minor landlord-tenant dispute. We believe the *combination* of these variables—firm size, experience, geography, caseloads, as well as overall hours-per attorney ratios for pro bono service—may paint a much more complicated picture of the extent to which law firms are (or are not) helping to deliver legal services to those who might not otherwise receive them.

Before delving into too much detail, it is instructive to emphasize the importance of analyzing pro bono opportunities (or the lack thereof) within the context of private law firms. After all, one might argue that public defenders and state-sponsored legal aid programs are supposed to shoulder the responsibility of providing adequate representation for indigent clients. Under this view, little harm may arise if the private bar decides to use its pro bono contributions as a mere recruiting tool, or as a training program for young associates, or as a welcome reprieve from more arduous work that lawyers may be forced to perform to generate revenue. What this view fails to acknowledge, however, is that pro bono work plays a *vital* role in supplementing state-funded legal aid, and lawyers outside of private law firms (*e.g.*, attorneys in the

government or the general counsels' offices within corporate America) perform almost no pro bono services.⁴

Professor Rhode recently reported that America's per capita expenditure on civil legal aid amounts to between one-sixth of one-fifteenth of what countries "with comparable legal systems, such as Canada, Australia, and Great Britain."⁵ ABA studies have documented that seventy-five percent of low-income persons who utilize lawyers receive assistance from private attorneys rather than from legal services organizations.⁶ Moreover, under the *status quo*, the private bar's pro bono contributions are doing little to fill the gap: eighty percent of the legal needs of low-income persons remain unmet,⁷ and "the average estimated pro bono contribution for the profession as a whole is shamefully inadequate: less than half an hour a week and half a dollar a day."⁸ And the reality of the situation may be far worse than these paltry numbers suggest, insofar as it is impossible to tell how many of the hours that attorneys define as "pro bono" *actually assist the poor*,⁹ as opposed to those "pro bono" efforts that are simply projects that lawyers perform *gratis* for their friends, relatives, or clients who fail to pay their bills. Because private pro bono practice often fills a gap created by deficient social programs, this descriptive project turns out to have profound normative implications.

4. See NATIONAL ASSOCIATION OF LAW PLACEMENT FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION, AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 35, *available at* www.nalp.org/events/AJD_NALP2005.pdf (last accessed April 20, 2005) [hereinafter AFTER THE JD].

5. Deborah L. Rhode, *Opening the Courthouse*, AM. LAWYER, Dec. 1, 2004.

6. CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE (1996) [hereinafter AGENDA FOR ACCESS]; CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, ABA, REPORT ON THE LEGAL NEEDS OF THE LOW-INCOME PUBLIC (1994) [hereinafter LEGAL NEEDS].

7. AGENDA FOR ACCESS, *supra* note 6; LEGAL NEEDS, *supra* note 6.

8. Rhode, *supra* note 5, at 74.

9. Indeed, Professor Rhode notes that "[o]nly about 10 percent of lawyers accept referrals from legal services or bar-sponsored programs for low-income groups." *Id.*

A. Pro Bono Hours-Per-Attorney

The most common yardstick that the popular press applies to gauge the development of the pro bono sector is time. For example, in its annual “Pro Bono Report,” the *American Lawyer* ranks law firms across the country on the basis of a “pro bono score,” which reflects (i) the number of pro bono hours-per-lawyer and (ii) the percentage of lawyers who clocked more than 20 hours over the calendar year.¹⁰ These annual reports, which are the most widely read aggregations of nationwide pro bono statistics,¹¹ have shown that lawyers’ average annual pro bono contributions declined steadily and dramatically throughout the 1990s.¹² Not surprisingly, pro bono service at the top 100 firms rose dramatically after the events of September 11, 2001, only to taper off in the years between the terrorist attacks and today.¹³ A snapshot of the *American Lawyer*’s hours-per-attorney figures helps reveal the strengths and weaknesses of a metric that has quickly become the industry standard.

10. According to the *American Lawyer*’s methodology:

We define pro bono work as legal services donated to organizations or individuals who could not otherwise afford them. We do not include nonlegal work for charities, and we do not include work done by lawyers in non-U.S. offices; the number of overseas lawyers is also determined using data collected in the NLJ [*National Law Journal*] 250 survey. We also asked firms to exclude paralegal time, bar association activities, community service, and time spent serving on boards or raising funds for charitable institutions. This definition is similar to the one used by the Pro Bono Institute for its law firm challenge, although unlike the PBI, we do not count pro bono work by summer associates and paralegals.

A Guide to Our Methodology, AM. LAWYER, Aug. 2003, at 133.

11. According to Factiva, the *American Lawyer* is the most widely read legal periodical in the United States, with a circulation of 270,000, a readership of more than 700,000 and a renewal rate of 80%. See Report: American Lawyer Media, available at www.factiva.com/whatsnew/story2apr102.asp?node=new4 (visited Apr. 28, 2005).

12. See Karen Hall & Dan McAllister, *Corporate Crusaders*, AM. LAWYER, Dec. 1, 2000 (noting that pro bono hours-per-lawyer in 2000 were more than 35 percent lower than comparable numbers in 1992).

13. See Vivian Chen, *Redemption, Year Two*, AM. LAWYER, July 1, 2003 (“Why was pro bono work surging? In part, the wave of volunteerism that followed the September 11 attacks...”).

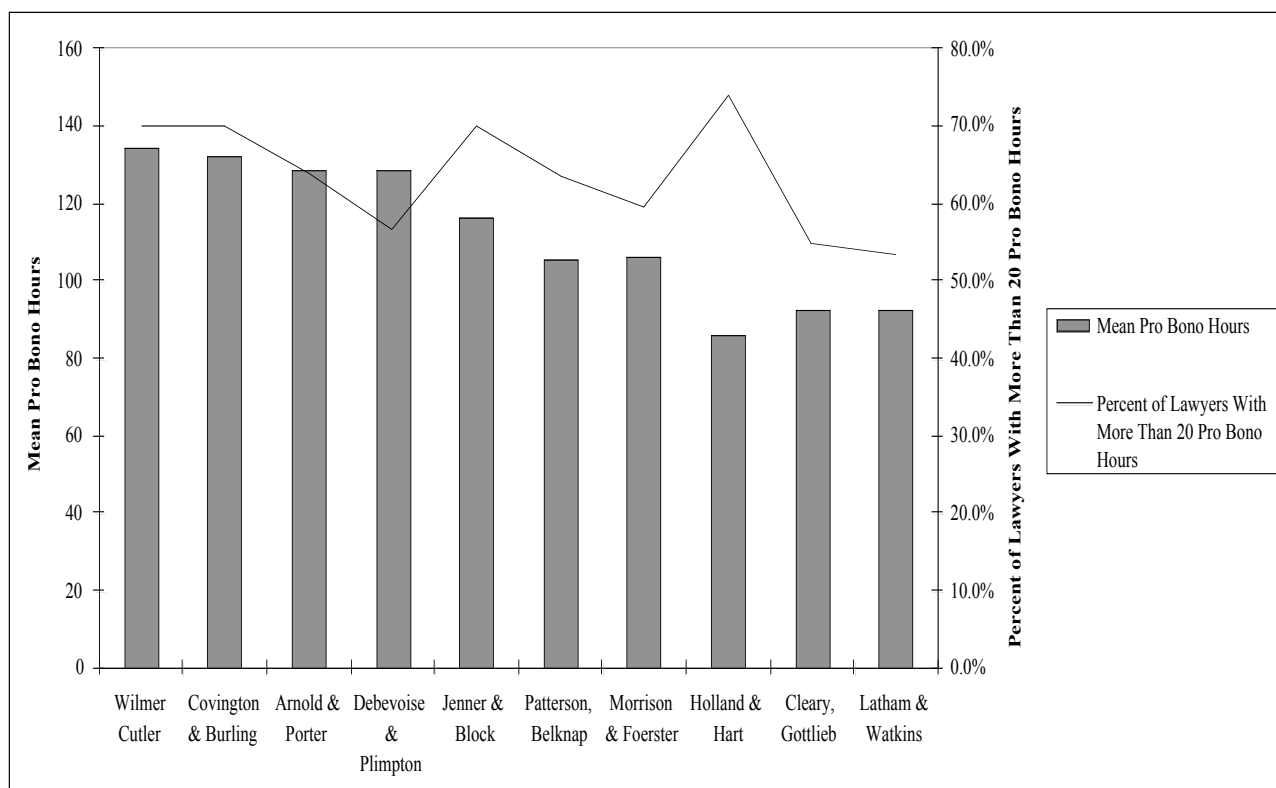


FIGURE 1. PRO BONO STATISTICS FOR TOP TEN *AMERICAN LAWYER* FIRMS (2004)

Before pointing out the myriad difficulties with the methodology used by the *American Lawyer*,¹⁴ it is worth emphasizing that its metrics *purport* to measure the extent to which a firm “[p]rovides high-quality, free legal services to the poor and to organizations that serve the poor,” as well as the extent to which a firm makes pro bono “a bedrock professional value.”¹⁵ Unfortunately, however, much greater detail is needed to understand the true contours of a firm’s commitment to pro bono service. For example, even though 70% of lawyers at Jenner & Block logged more than 20 hours of pro bono work, it is impossible to tell from the *American Lawyer*’s summary statistics how this breaks down amongst the firm’s different strata of attorneys (*e.g.*, junior associates, senior associates, junior partners, senior partners, and so on). Moreover, even on its own terms, the *American Lawyer*’s hours-per-attorney statistics betray their own

14. See *supra* note 10. The figures in Figure 1 are drawn from *The A-List*, AM. LAWYER, Sept. 2004.

15. See Aric Press, *The A-List*, AM. LAWYER, Sept. 2003.

inadequacy: by counting the number of attorneys per firm that compile 20 or more hours of pro bono service each year, the *American Lawyer* ignores the fact that this number is merely 40 percent of the ABA-recommended amount¹⁶ and an insufficient yardstick for measuring firmwide commitment to *pro bono publico*.

As a barometer of nationwide pro bono activity, the *American Lawyer*'s analyses are sorely deficient. To problematize the unvarnished portrait painted in the crude hours-per-attorney figures presented above,¹⁷ we present below an alternative roadmap for investigating the pro bono world. In addition to the raw number of hours worked in pro bono services, an accurate portrayal of the real world requires statistics on firm size, attorney experience, geographic and/or legal market characteristics, as well as qualitative information on the types of pro bono cases performed by private firms and the pro bono needs of their respective legal communities.

B. Variations in Pro Bono Practices by Firm Size

One of the biggest problems with the *American Lawyer*'s pro bono data is that it is limited to the nation's top large law firms, comprising both a geographically confined

16. See ABA Model Rule 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year.").

17. To be fair to the *American Lawyer*, its pro bono data is not limited solely to hour-per-attorney charts and inter-firm rankings. Each annual "Pro Bono Report" also includes numerous anecdotes, which are equally unhelpful for gleaning a full, accurate, and representative understanding of America's legal pro bono culture. For example, in 2003, *American Lawyer*'s "Pro Bono Report" included reports on two Morgan, Lewis & Bockius partners who sprung an innocent man from Louisiana's death row; an associate at Venable who set up a micro-financing organization in India, in order to lend small sums to families who might otherwise sell their children into bondage; litigators at Morrison & Foerster who entered their third year of challenging conditions in California public schools; a team from Cleary, Gottlieb, Steen & Hamilton that helped New York's Legal Aid Society to secure tax-exempt financing to purchase its first office building in Harlem; and numerous attorneys—"from the managing partner at Arnold & Porter to squads of associates at a dozen firms"—who took on political asylum cases. See Chen, *supra* note 13, at 92.

set of lawyers and a relatively small set of less than 20 percent of attorneys nationwide.¹⁸ While these numbers might prove particularly salient for students at the country's elite law school, they do not provide a helpful portrait of the state of pro bono more generally. The trends reported by the *American Lawyer* touch a culturally homogenous group of attorneys in large cities, whose priorities and resources might differ substantially from those of rural or small-firm lawyers, which (despite their lower levels of resources) comprise a vital component of the legal pro bono community.¹⁹ Some scholars suggest, in fact, that the wealth of pro bono activity is performed by such smaller operators, a sense supported by regional statistics that demonstrate more proportional service in many non-large firm states than in legal capitals (outside of New York City).²⁰ As such, the mid-1990s pro bono nadir we see from examining the large firms' reports may or may not provide an accurate estimation of nationwide service. At the same time, while we know that most large urban firms do provide some outlet for pro bono service, the trend

18. *See id.* at 84.

19. *See, e.g.,* Deborah Howard, *The Law School Consortium Project: Law Schools Supporting Graduates to Increase Access to Justice for Low and Middle-Income Individuals and Communities*, 29 FORDHAM URB. L.J. 1245, 1246 (2002) ("helping solo and small-firm practitioners provide high quality legal services is vital because of the crucial role they play in the legal community. In light of the limited funding for, and restrictions on, legal services organizations and the decline in pro bono participation by large law firm attorneys, solo and small-firm practitioners are essential sources of legal services to low and moderate-income individuals and communities."); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 81 (1988) ("[within] smaller firms, lawyers press for an expansive pro bono policy, emphasizing the assistance that they and their litigation facilities can give to projects of existing public interest groups. They also press for a narrow view of client conflicts and for some willingness to take risks in offending clients with their public interest projects. They are active in bar groups, hoping to influence the sections and committees that define practice standards. They have formed alternative bar associations with public interest projects of their own. They give their time and talents to back up centers for legal aid offices. And they are active in more traditional ways, working for political candidates, writing amicus briefs, taking sabbaticals to serve in office."). *Cf.* Stewart Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768-69 (1988) (noting "most civil rights litigation is *not* brought by institutional litigators or by large firms engaging in pro bono activity" but instead by the "local, small-firm lawyer.") (emphasis added).

20. *See* Lua Kamal Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 903 (2004) ("[t]he majority of [pro bono] legal services are provided by small firms and solo practitioners. However, there is no statistical information that captures the true extent of pro bono participation by such lawyers."); Howard, *supra* note 19, at 1246-47.

is not replicated nationwide. In fact, various studies put the percentage of firms nationwide that perform pro bono legal services work at between just 20 and 50 percent.²¹

These criticisms of the *American Lawyer* data are borne out in the figures collected by the American Bar Foundation's *After the JD* report. As Figure 2 shows,²² the highest percentage of pro bono participation is found among solo practitioners and respondents in the largest law firms. Yet while solo practitioners and large law firms lead the pack in terms of percentage of pro bono participation, large law firms are far ahead in terms of hours spent on pro bono practice.

21. See AGENDA FOR ACCESS, *supra* note 6; LEGAL NEEDS, *supra* note 6; see also DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 37, 59 (2000) (more than 50 percent of lawyers do not participate in pro bono practice); Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 389 (1994) (approximately 80 percent of the bar engages in no pro bono on behalf of the poor); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 90 (1990) (approximately 16.9 percent of the private bar participates in pro bono); Yuille, *supra* note 20, at 902-03 ("nationally, various estimates indicate that between 50% and 93% of lawyers do not perform any pro bono work at all").

22. The data for Figure 2 are drawn primarily from AFTER THE JD, *supra* note 4, at 37 fig. 4.3.

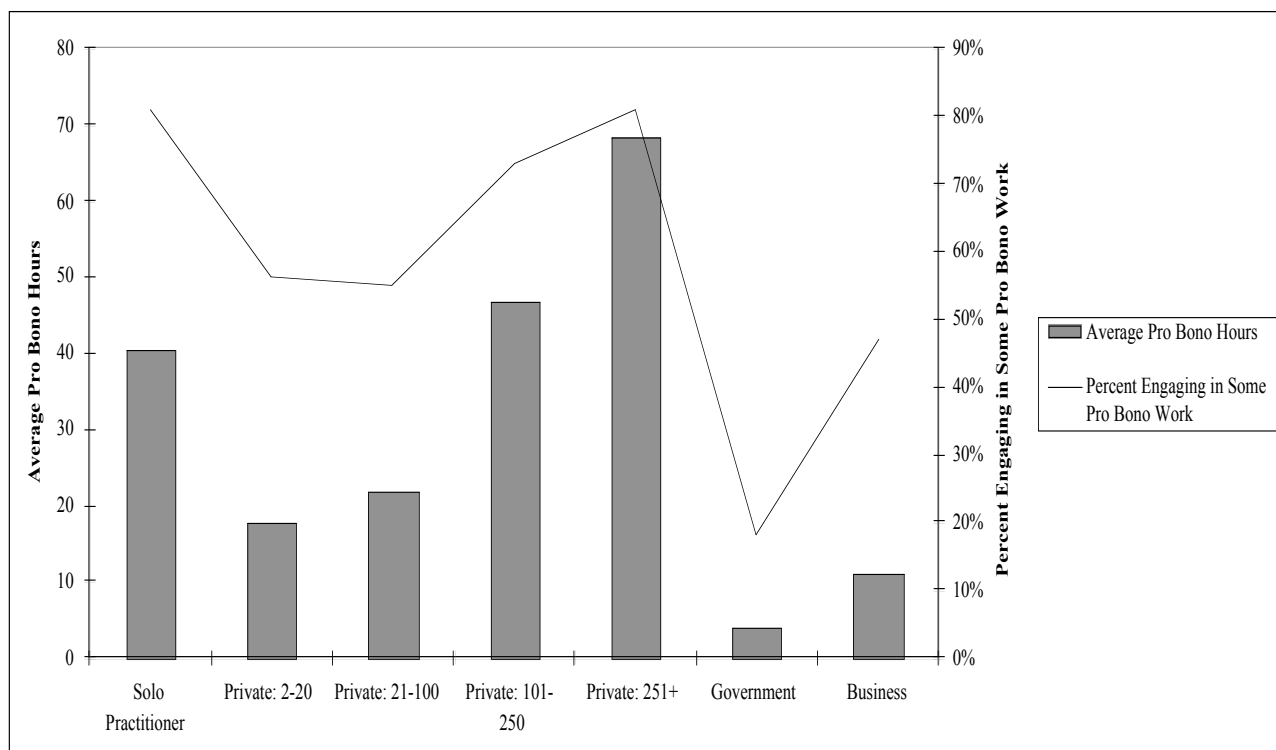


FIGURE 2. PRO BONO STATISTICS BY PRACTICE SETTING, 2004

As Figure 2 suggests, and Figure 3 confirms,²³ the number of reported pro bono hours varies widely according to firm size. While lawyers undertaking pro bono in all private practice settings reported an average of 39 pro bono hours a year,²⁴ respondents in offices with 100 or more attorneys reported an average of 75 hours of pro bono work.²⁵ And as previously noted,²⁶ an hour of pro bono service in a small firm is not necessarily equal to an hour worked in a large firm.

23. The data depicted in Figure 3 are drawn primarily from William J. Dean, *The 2000 Survey of Pro Bono Activity by New York Law Firms*, N.Y.L.J., May 7, 2001, at 43. The data have been weighted to approximate a nationally representative sample. For a discussion of potential problems with this approach, see *infra* note 31, and accompanying text.

24. See *The Am Law 100*, AM. LAWYER, July 1, 2000, at 38.

25. See *AFTER THE JD*, *supra* note 4, at 35.

26. See *supra* text accompanying notes 3-4.

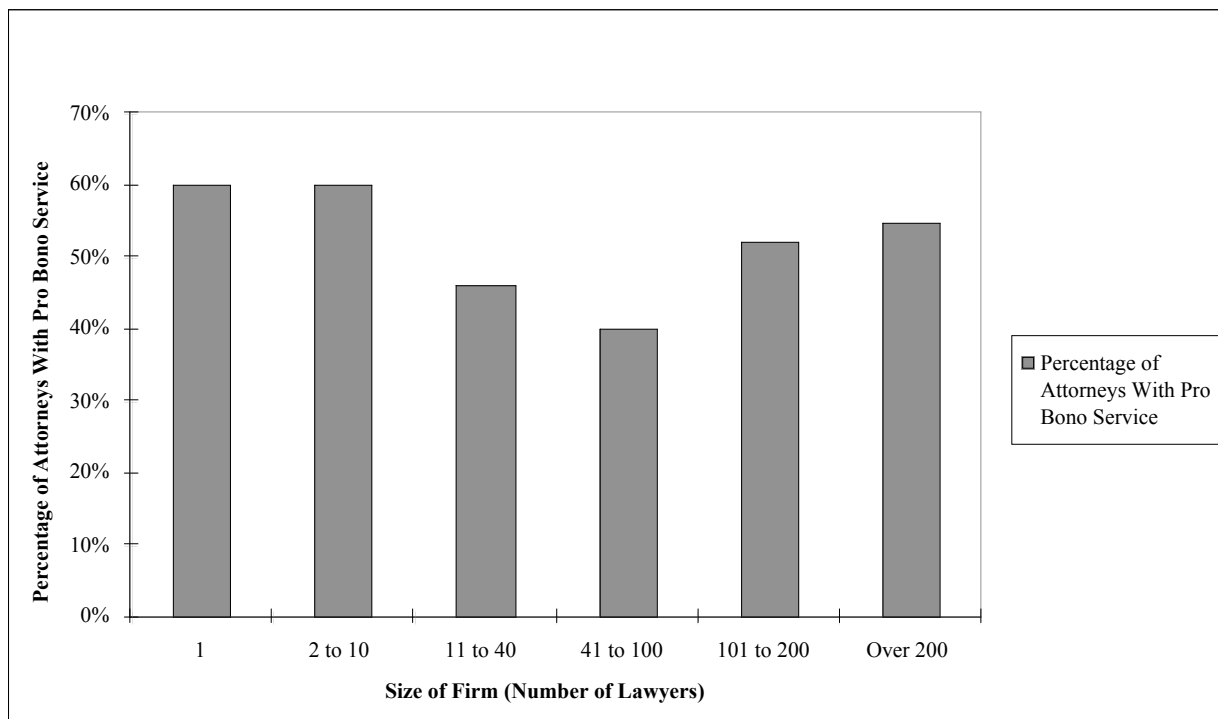


FIGURE 3. PRO BONO STATISTICS BY FIRM SIZE, 2000

There are several possible explanations for the pattern observed in Figures 2 and 3 (aside from differences in personal commitments to pro bono work, which may or may not be correlated to firm size). The largest firms may be more likely to express an institutional commitment to pro bono work (such as hiring a full-time attorney to manage a firmwide pro bono effort and investing in formal institutional mechanisms for linking attorneys to pro bono opportunities). Alternatively, large firms may be more likely to use pro bono projects as part of larger training programs, which would be cost-prohibitive for smaller firms.²⁷

C. Variations in Pro Bono Practice by Experience

Another curious tension in the pro bono literature centers around *who* within each firm is actually doing the pro bono work. While “[i]t is no secret that most pro bono

27. Evidence for this hypothesis can be found in the fact that associates from large firms that do the most pro bono work are also less likely to report a desire for more training. See AFTER THE JD, *supra* note 4, at 35.

work is done by *associates*,²⁸ it is also no secret that the *partners* get most of the pro bono credit, insofar as the high-profile cases (which tend to capture the public spotlight) and the attention that comes from a successful private pro bono practice, falls on senior attorneys' shoulders.²⁹ However, un-nuanced statistical analyses and anecdotal evidence shed little light on what is actually happening in the firms' pro bono practices.

Figure 4 offers a preliminary assessment of how pro bono work varies at different tenure levels.³⁰

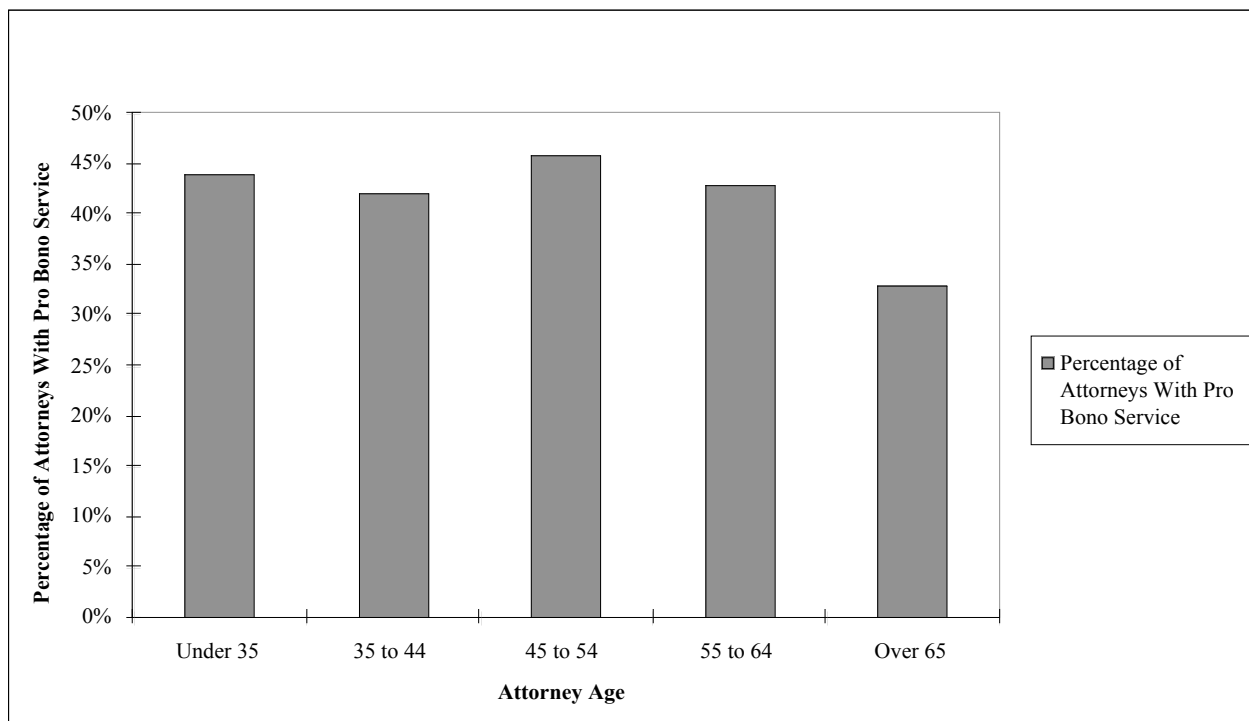


FIGURE 4. PRO BONO STATISTICS BY AGE, 2000

28. William J. Dean, *The Role of the Private Bar*, 25 FORDHAM URBAN L.J. 868, 868 (1998) (emphasis added). See also *infra* note 35 and accompanying text.

29. See, e.g., *Partners for Good*, AM. LAWYER, Sept. 2003, at 88-89 (picturing fifty partners who lead private pro bono practices across America); Paul Braverman, *Blood Work*, AM. LAWYER, Sept. 2003, at 90 (focusing on partners' involvement in a death row defense); Carlyn Kolker, *Outside the Core*, AM. LAWYER, Sept. 2003, at 96 (describing partners' involvement with the Appleseed Foundation in Washington D.C.'s public schools). See also Amon, *supra* note 2 (describing one partner as the center of Latham & Watkins' pro bono practice and noting that he is "the public face of good deeds at the firm.").

30. The data depicted in Figure 4 are drawn primarily from Dean, *supra* note 23.

What is perhaps most striking about Figure 4 is the steady rate of pro bono work performed across a range of tenure levels. One explanation, certainly, is that an initial affection for pro bono work endures and tracks a lawyer throughout his or her career; another explanation however is that lawyers become increasingly preoccupied with client work but nonetheless affix their name to pro bono work spearheaded by younger members of their firm. Yet another explanation is that the data in Figure 4—which are drawn from a survey of members of the New York State Bar—are not, in fact representative of other locales. Though the authors of the New York survey attempted to weight their sample to generate a nationally representative portrayal of pro bono practice,³¹ one might be justifiably skeptical about the researchers’ ability to correct for sampling biases when our baseline understanding of geographic variations in pro bono patterns is altogether lacking and unmoored from empirical proof. The next section addresses this matter in greater depth.

D. Variations in Pro Bono Practice by Geography

The *American Lawyer* also neglects regional disparities altogether. Indeed, by focusing on large firms, the *American Lawyer* provides little guidance for evaluating how prevalent pro bono work is across regions. It is not just the dearth of statistics that compounds the problem, but also the quality and character of the scant regional statistics that are made available. Figure 5 below identifies the top 10 states, ranked by percentage of pro bono attorneys out of total active attorneys, as reported by the American Bar Association Center for Pro Bono. A cursory review reveals, again, the advantages and disadvantages of analyzing pro bono along geographic lines in such a superficial manner.

31. See Dean, *supra* note 23, at 45 n.3.

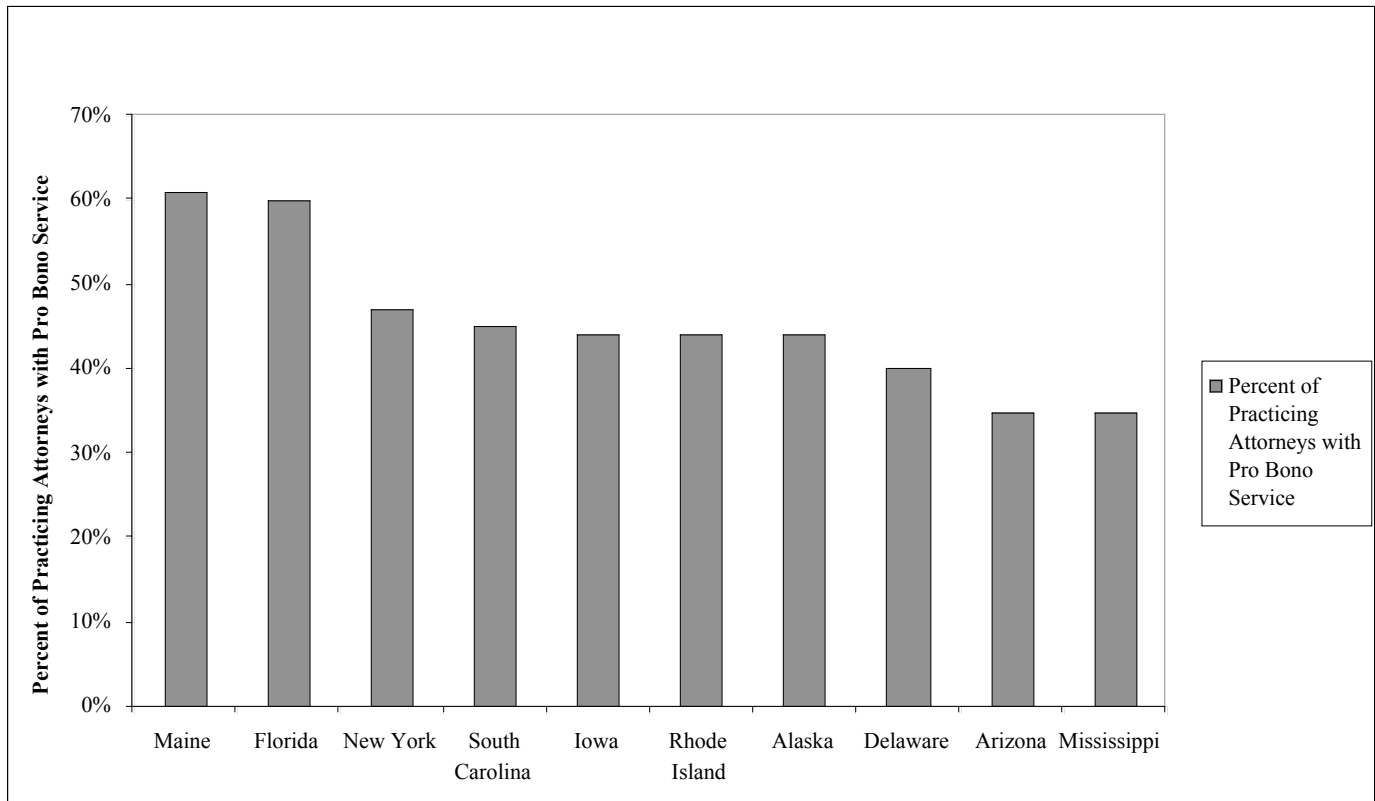


FIGURE 5: PRO BONO STATISTICS BY STATE, 2004

The first problem that stares out from Figure 5 is the naked use of percentages without further elaboration.³² Failing to define how much work an attorney must complete to qualify as an “attorney with pro bono service” leaves a number of important questions unanswered. For starters, these data take no account for the fact that an attorney with one hour of annual pro bono service is very different from an attorney with 500. Moreover, it is impossible to assess whether pro bono work is predominantly conducted in large urban centers or by small rural firms. Furthermore, the fact that 61 percent of attorneys in Maine qualify as “pro bono attorneys” tells us nothing about the extent to which those attorneys are meeting (or failing to meet) heretofore unmet legal

32. The figures in Figure 5 are drawn from AMERICAN BAR ASSOCIATION CENTER FOR PRO BONO, PRO BONO DELIVERY AND SUPPORT: DIRECTORY OF STATEWIDE MODELS (1998) [hereinafter ABA, STATEWIDE PRO BONO]; *The Am Law 200*, AM. LAWYER, Aug. 1, 2004.

needs in Maine's communities. In short, it is impossible to look at graphs like Figure 5, which fill the *American Lawyer's* pro bono pages,³³ to glean an understanding of regional or geographic disparities (or the lack thereof) in the empirical realities of pro bono practice.

Admittedly, the primary purpose of the *American Lawyer's* "Pro Bono Reports" may not be to provide a comprehensive database of pro bono work across the country. Indeed, it appears to serve more usefully as a recruiting resource and a helpful starting point for students graduating from elite law schools. Nonetheless, it is the best pro bono indicator that we have; after all, it is comprehensive, longitudinal, widely-circulated, and trusted. Unfortunately, it paints a portrait that is vague at best and misleading at worst. In the final analysis, knowing that 15 percent of California lawyers performed some pro bono work in 1999 compared to 35 percent of Mississippi lawyers is better than nothing, but it does not actually tell us either which state needs the attention of advocates, nor does it identify which states should be attractive to law students and young lawyers interested in making a commitment to pro bono work in their private practice careers.

E. Adrift Without a Compass

The currently available data on pro bono provides little quantitative guidance on *how much* pro bono service is actually being done, as well as *where* it is being done and *who* is doing it. Even more inadequate, however, are the data (or the lack thereof) that

33. Equally unhelpful is the litany of anecdotes that the American Lawyer staff sprinkles throughout its "Pro Bono Reports." See, e.g., Paul Braverman, *Why Washington? Is it the Proximity to Power, the Obsession with Public Policy, or Just Something in that Swampy Air? Getting to the Bottom of Washington, D.C.'s Pro Bono Dominance*, AM. LAWYER, Sept. 1, 2004.

we have on the *kinds* of cases that firms are self-reporting as “pro bono.”³⁴ The *American Lawyer* and *After the JD* studies make no mention whatsoever about the differences between a pro bono hour spent defending a death-row inmate and a pro bono hour spent drafting a will. Clearly, the activities are qualitatively different—however, by failing to include qualitative questions in their surveys, the current analysts have painted a woefully inaccurate (and incomplete) picture of private firms’ contributions to *pro bono publico*.

In the end the current body of literature on the state of pro bono exhibits a damning internal tension. On the surface, the literature appears replete with facts and figures sliced along a range of axes. Upon deeper investigation, however, it is impossible to draw from these data points and databases, even when taken together, any comprehensive or meaningful portrait of the state of pro bono across the country. Thus, although early efforts to compile statistics are a welcome development in a field too long pervaded by rank speculation and uncertainty, there is much more that can, and should, be done. Until then, the pro bono legal sector will be not just under-understood but misunderstood.

II. FLUX IN PATTERNS OF PROFESSIONAL PRACTICE

Because most pro bono legal services in the United States are provided by attorneys at the outset of their legal careers,³⁵ a systematic understanding of American pro bono service quality also demands a careful evaluation of the career paths that these attorneys follow in the years immediately following their graduation from law school.

34. See *supra* note 10.

35. For an example of an illustration of this common arrangement within a major law firm, see, e.g., Gail Belsky, *Skadden’s Tabak: Zealot for the Condemned*, AM. LAWYER, Apr. 25, 1989 (noting that “[m]ost of the [firm’s] 150 New York lawyers working on pro bono cases [were] associates”). See also *supra* notes 28-29 and accompanying text.

The quality of pro bono services is likely to be influenced, for example, by the presence—or absence—of midlevel attorneys with pro bono experience available to offer guidance to newly-graduated attorneys interested in providing pro bono services. In addition, we suspect that the quality of pro bono services will depend in part on the extent to which new lawyers are likely to remain in their current position, as rapid turnover may well drain experienced pro bono attorneys from organizations willing to offer these services. For these reasons, analysis of the raw number of hours of pro bono work performed in the United States³⁶ provides an incomplete picture of pro bono services without a more detailed assessment regarding *who* is providing these services and *under what circumstances* they are doing so.

In this Part, therefore, we offer a review of the existing literature dedicated to analysis of the typical career paths of those lawyers most likely to provide pro bono services at the outset of their careers. Until recently, however, analysis of recently-graduated attorneys' typical paths to pro bono has been characterized principally by anecdotal reference to individual cases and lawyers,³⁷ while systematic study of pro bono attorneys' career decisions remained little more than an elusive aspiration among students of the legal profession.³⁸ To the extent that conclusions can be drawn about the influence of recently-graduated attorneys' career paths on the quality of pro bono services,

36. See, e.g., Susan Beck, *A Series of Fortunate Events*, AM. LAWYER, Feb. 1, 2005 (indicating that one firm invested more than 3,600 hours in pro bono matters); Smith, *A Winning Formula*, *supra* note 2 (same). See generally *In House*, AM. LAWYER, Sept. 1, 2004 [hereinafter *In House*] (describing in terms of hours of work performed the efforts of in-house counsel on pro bono matters).

37. See *infra* note 61 and sources cited therein.

38. For this reason, this Part draws on a detailed longitudinal survey of a the career paths of a cohort of attorneys that graduated law school in 2000 prepared by the National Association of Law Placement Foundation for Law Career Research and Education. See *AFTER THE JD*, *supra* note 4. Although this report offers the advantage of observing the dynamics of a single group of lawyers over a determined period of study, the cohort has not yet completed the ten-year period following graduation that the authors intend to review. *Id.* at 89-90.

however, they point to a troubling series of trends that may belie broader optimism among the legal community regarding the provision of pro bono legal services in the United States and around the world.³⁹

A. Post-Graduation Job Placement and Subsequent Career Movement

Although the post-graduation employment plans of recent law school graduates has long fascinated both academics⁴⁰ and the media,⁴¹ relatively little analysis has been devoted to the career changes that are understood to be common in the legal profession.⁴² A recent report, for example, indicated that more than 33% of attorneys are likely to make such a change in the first three years of their career following graduation from law school.⁴³ In this section, we describe the preliminary findings available in the legal profession literature with respect to the careers attorneys choose after law school—and, more importantly, the occupational *changes* that these attorneys are likely to undertake early in their careers.

As a preliminary matter, understanding the job paths that recently-graduated lawyers are most likely to follow directly after graduation is a helpful basis for evaluating the effects of movement within these categories in the early years of most attorneys’

39. See, e.g., *In House*, *supra* note 36 (indicating that in-house pro bono hours increased 39% in 2003); see also Nathan Koppel, *American Export*, AM. LAWYER, Sept. 2003 (arguing that “[p]ro bono is beginning to flourish overseas).

40. See, e.g., Note, *Making Docile Lawyers*, 111 HARV. L. REV. 2027, 2035 (1998) (describing the post-graduation employment rate for Harvard Law School students); see also SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, ABA APPROVED LAW SCHOOLS: STATISTICAL INFORMATION ON AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS 2004 EDITION (2004).

41. Compare Bill Myers, *Employment Rate for Law School Graduates Holds Steady*, CHI. DAILY L. BULLETIN, July 9, 2004, at 1 (indicating that employment rates for law students after graduation have remained high) with Barbara Ballinger, *Grads in Licensing Limbo*, CHI. TRIB., Sept. 19, 2004, at C2 (noting that some law students nevertheless have difficulty finding employment after graduation).

42. For a rare exception to this general phenomenon, see *Supplement: Midlevel Associates*, AMERICAN LAWYER, Oct. 1990 (providing survey results for midlevel associates at major law firms and noting that many were considering a career change).

43. AFTER THE JD, *supra* note 4, at 53.

careers. Figure 6 below provides an analysis of the career destinations of law school graduates in 2003.⁴⁴

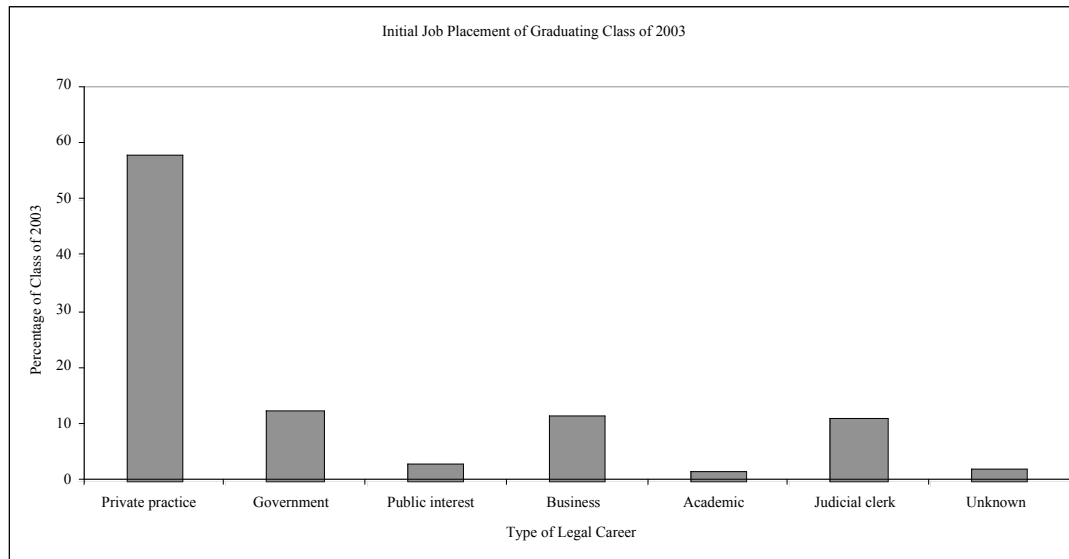


FIGURE 6. LAW SCHOOL GRADUATES' INITIAL EMPLOYMENT DECISIONS, 2003

Figure 6 confirms the widely-reported phenomenon that more than 50% of recent law school graduates intend to pursue private practice directly after graduation. Although Figure 6 offers a revealing perspective on the destination of many law students after graduation, however, it provides no insight with respect to the effects of recent graduates' decisions to *change* jobs within the legal profession. Because we expect that such career movement is likely to have significant effects on the quality of pro bono work, a study of pro bono services would be significantly strengthened by a closer analysis of these post-graduation career changes.

A recent study prepared by the National Association for Law Placement has tracked a cohort of graduates from national law schools in the year 2000, monitoring the

44. This data is drawn from ABA-accredited law schools' depictions of their graduating classes in 2003. See NATIONAL ASSOCIATION OF LAW PLACEMENT, NALP'S CLASS OF 2003 NATIONAL SUMMARY REPORT, available at <http://www.nalp.org/nalpresearch/2003natl.htm> (last accessed April 20, 2005).

graduates' employment status and surveying the group on an annual basis.⁴⁵ As a preliminary matter, the report confirms our expectation that career changes are a common phenomenon among recent law school graduates, indicating that 18 percent of the lawyers in their group have changed jobs at least once during the first three years of their career.⁴⁶

Perhaps more importantly, the report also suggests that the incidence of employment changes following law school graduation is unevenly distributed among legal professions. Among those lawyers within the cohort that worked in small-firm settings, for example, more than 66 percent had changed jobs two or more times, compared to just 33 percent in the sample overall.⁴⁷ Figure 7 below provides an analysis of the distribution of the report's lawyers throughout the legal profession and indicates the fraction of attorneys within each vocation who arrived at their current job after a career change.⁴⁸

45. *Id.*

46. *Id.* at 53.

47. *Id.*

48. This data is drawn from surveys of the cohort of law school graduates surveyed in AFTER THE JD, *supra* note 4, at 54 tbl. 7.1. Much of the career movement described in this data, according to the authors of the report, took place within the first three years after law school graduation. *See id.*

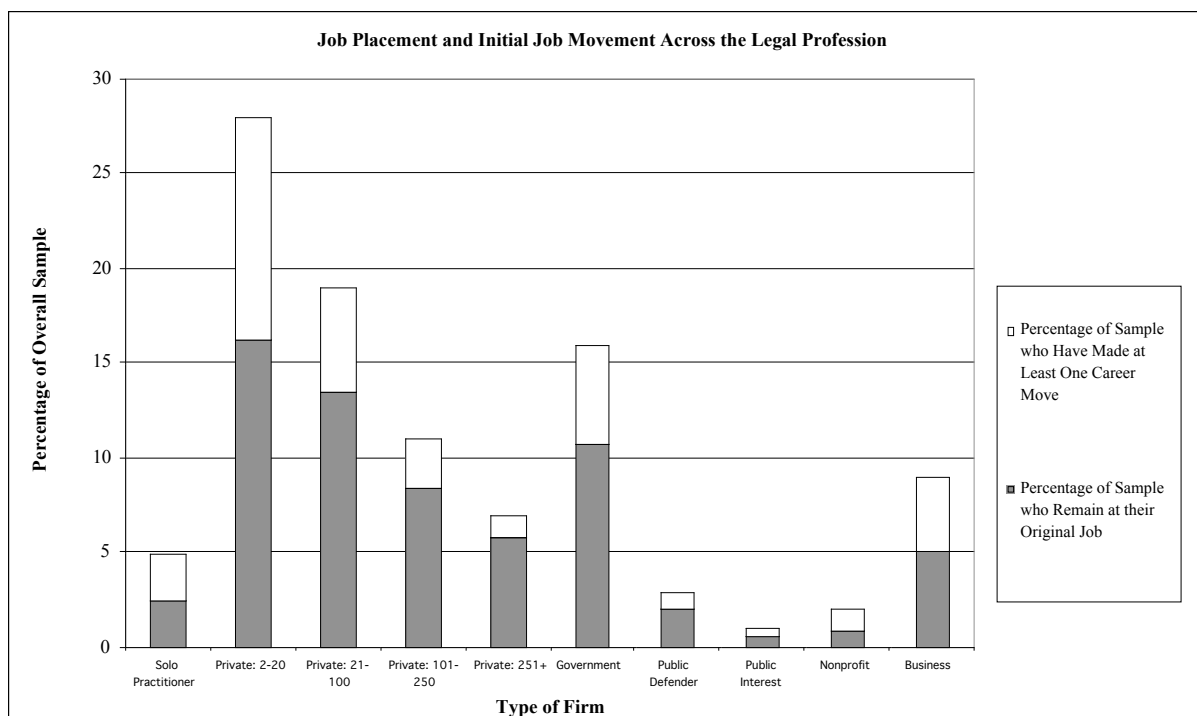


FIGURE 7. INCIDENCE OF CAREER CHANGES ACROSS LEGAL VOCATIONS

Figure 7 indicates that, during the first three years following law school graduation, lawyers in specific positions are far more likely to have arrived there by way of a career change than others. More than 50 percent of lawyers in firms with twenty or fewer practitioners, for example, arrived at those firms after at least one career change, while just 16 percent of attorneys in the largest firms (those with more than 250 lawyers) have changed careers in the three years following their graduation from law school. Career changes were also far more common for government and nonprofit lawyers (33 percent and 55 percent of lawyers in these professions, respectively, have changed careers at least once) than for lawyers in the largest three categories of firms.

The report also makes clear that these lawyers' *expectations* about whether they will change jobs in the near term varies considerably among the various types of legal employment. Figure 8 below reports the results of a survey of graduates three years

following law school asking whether the attorneys felt they were likely to change jobs within two years.⁴⁹

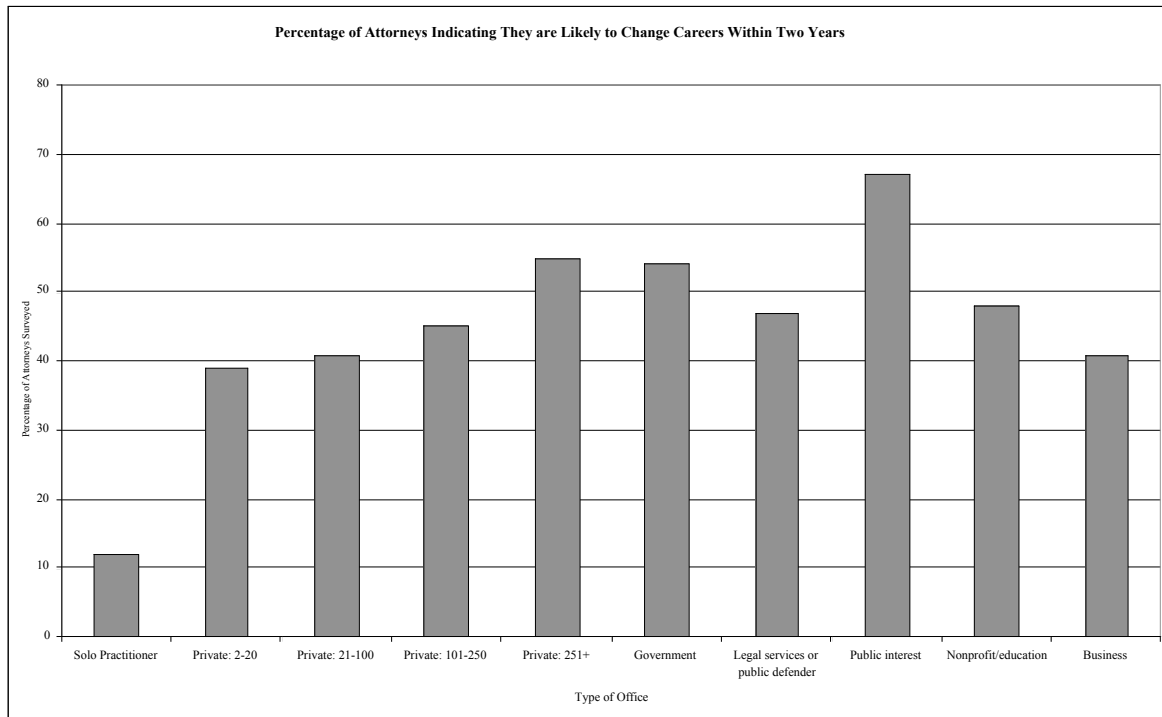


FIGURE 8. ATTORNEY EXPECTATIONS FOR JOB CHANGES IN THE NEAR TERM

Overall, 44 percent reported plans to change jobs within two years, half of whom planned to move within the year.⁵⁰ Moreover, as Figure 8 demonstrates, attorneys in the public interest field were most likely to anticipate a career change in the near term, with nearly 70 percent of respondents indicating that they would change jobs within two years.

Importantly, Figure 8 makes clear that a significant proportion of attorneys in very nearly *all* of the surveyed vocations expect that they will change careers in the relatively near term. More than 50 percent of practitioners in firms with twenty or more lawyers, for example, indicated that they expected to make a career change within two

49. This data was drawn principally from AFTER THE JD, *supra* note 4, at 54 tbl. 7.1.

50. *Id.* at 53.

years of the survey, indicating that substantial turnover in the near term is likely among associates in these firms.

Indeed, a review of the results of surveys from attorneys practicing in firms with twenty or more lawyers in both Figures 7 and 8 indicate that there may be a substantial group of experienced attorneys who arrived at these firms directly after graduation two or three years ago—and who expect to depart the firms in the relatively near term. To the extent that this group is likely to provide expertise in pro bono service provision, then, it remains unclear whether lawyers in this group are likely to continue providing these services in the long term.

Additional insights are available from a comparison of the career choices of the members of this cohort with those of the overall population of lawyers. Figure 9 compares the distribution of legal careers between these two groups.

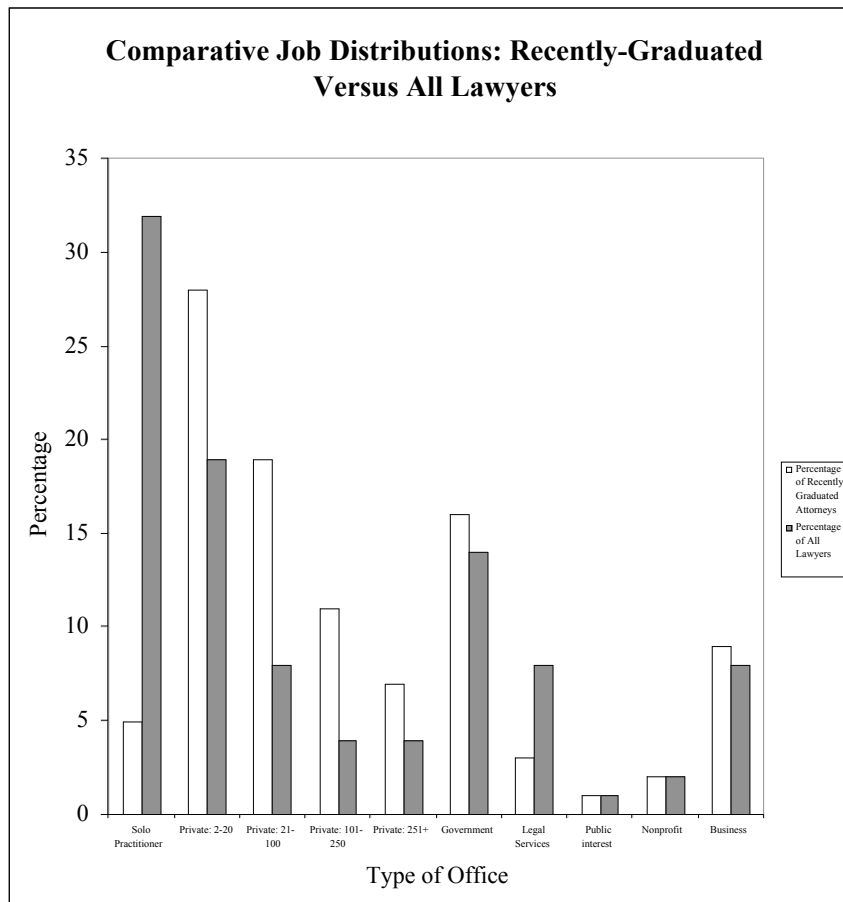


FIGURE 9. COMPARATIVE JOB DISTRIBUTIONS: RECENT GRADUATES VS. ALL LAWYERS

As Figure 9 shows,⁵¹ there are some significant disparities between the cohort of recently-graduated lawyers and the general attorney population. Most notably, there are significantly fewer solo practitioners and significantly more large-firm lawyers among recent law school graduates. Assuming that the recently-graduated cohort will regress to the mean, we would expect, unsurprisingly, that young associates will migrate from large

51. This chart compares vocational data drawn from the cohort studied in *AFTER THE JD*, *supra* note 4, at 54 tbl. 7.1, with that of the overall population of attorneys in the United States. Information on the latter group was obtained from *id.* at 27 tbl. 3.1. In order to make these populations fully comparable, we made several assumptions. In the overall lawyer population, for example, we assumed that the fraction of lawyers practicing in firms with greater than one hundred attorneys was roughly equally distributed between firms with between 101 and 250 lawyers and firms with greater than 250 lawyers. In addition, we assumed that the 16 percent of attorneys that the study indicated were engaged in legal services, public defender work, and state or local government was approximately equally divided between the former two categories and the latter. These additional assumptions were necessary to make the categories for this analysis equivalent to those provided in *AFTER THE JD*, *supra* note 4.

firms to solo practices. Interestingly, it appears that the fraction of lawyers in government practice, public interest, and business are relatively equal between these populations.

Perhaps most importantly, these survey results point to the dearth of empirical evidence available about the career paths of lawyers after their graduation from law school. Although we are able to identify, by profession, the lawyers most likely to have changed careers shortly after their graduation and those most likely to seek a career change in the short term, this data leaves us unable to identify *where departing lawyers are most likely to go* after they leave a particular profession. Moreover, the data indicates only the percentage of attorneys in a given professional setting who had previously moved at least once but omits where these associates *came from*. Because this would reveal much about the effects of associate turnover on the provision of pro bono services—for example, whether lawyers departing firms are likely to choose careers that permit them to continue an active pro bono practice after their departure—the lack of data on this question renders us unable to assess fully the relationship between attorneys’ career paths and pro bono services.

B. Interactions Between Attorney Career Paths and Geography

Attorneys’ career choices following graduation from law school might also be expected to have a significant influence on the provision of pro bono services. In particular, if career changes following graduation are likely to distribute pro bono expertise to a particular region of the United States, we might conclude that the provision of pro bono services depends critically on ensuring that enough are available to provide pro bono counsel in particular geographic areas.

Unfortunately, however, it appears that rigorous detail regarding the effects of attorney mobility on the geographic distribution of pro bono services is generally unavailable. Although a recent longitudinal study has provided useful data with respect to the incidence of associate departures by profession,⁵² that report provided scant information about the effects of those departures on the geographic distribution of lawyers following their distribution. The report did, however, provide a description of the link between geography and attorneys' *professions*. Figure 10 below summarizes the results of this analysis.

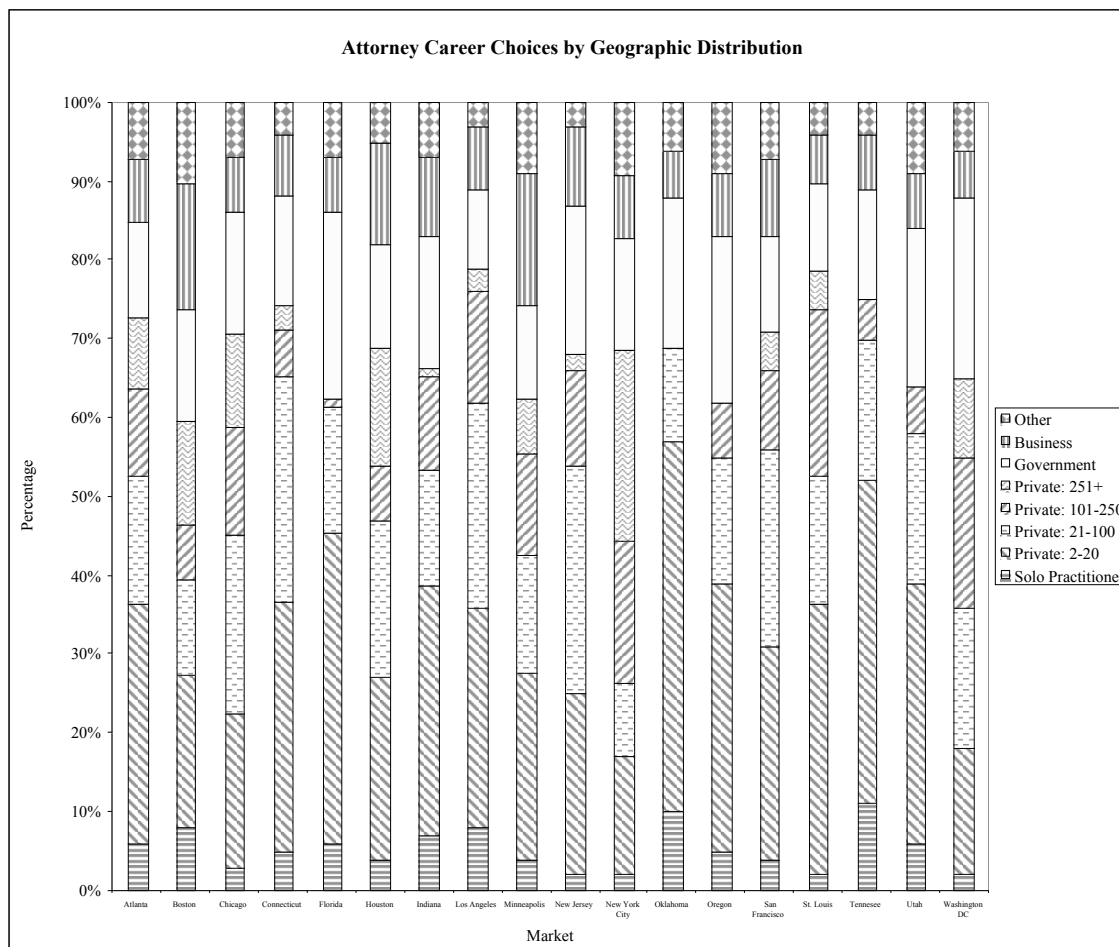


FIGURE 10. DISTRIBUTION OF ATTORNEYS BY VOCATION AND GEOGRAPHY

52. See *supra* text accompanying notes 45-48.

Figure 10 indicates, then, that approximately three years after their graduation attorneys in particular geographic locations are more likely to be engaged in particular types of law practice than others. Solo practitioners, for example, appear to be far more common to Los Angeles (8 percent of respondents) than New York (2 percent of respondents).

This data provides little insight, however, with respect to the likelihood that a career change will have an effect on an attorney's geographic location. Additional empirical work on the effects of attorney mobility on the geographic distribution of attorney resources generally, then, could provide critical insight with respect to the link between attorneys' career paths and the distribution of pro bono resources across the United States.

C. Career Path as a Function of Law Firm Hierarchy

In addition to studies detailing the likelihood of career changes for attorneys across various legal professions, much recent work has been dedicated to assessing the different effects of turnover on associates and partners in American law firms. To the extent that expertise in the provision of pro bono services resides principally in one or the other group of attorneys, we might expect that substantial differences with respect to turnover across these populations would have significant implications for the quality of pro bono services.

The phenomenon of substantial associate turnover—a virtual canon of law firm economics⁵³—has been a subject of considerable attention in recent years. National

53. Sandra Raye Mitchell, *Will You Still Love me Tomorrow?*, AM. LAWYER, Oct. 1998 (noting that the “traditional pyramid structure of law firms” “assume[s] the need to winnow out most associates over time”).

surveys, for example, have indicated that as many as 9 percent of associates depart their new firms within the first year of their employment.⁵⁴ And perhaps unsurprisingly in view of the pyramid structure on which many law firms rely, a recent report estimated that as many as 43 percent of new associates have left their firms by the end of their third year.⁵⁵ Moreover, as we noted earlier in this Part, 44 percent of the lawyers in the *After the JD* study planned to leave within two years, confirming this data.⁵⁶

Partners, however, are not immune from the substantial turnover common among most American law firms. In addition to several recent reports detailing significant partner churn at high-growth firms,⁵⁷ studies have also indicated that as much as 18 percent of the partner base hired by high-growth firms in 1999 had departed those jobs by the fall of 2003.⁵⁸ Our independent analysis of a sample of partner departures in recent years indicates that partners are moving between firms rather than from firms to different careers generally. Figure 11 below provides a breakdown of the most common partner career destinations after departing firms.

54. *Id.*

55. *Id.*

56. AFTER THE JD, *supra* note 4, at 53.

57. See, e.g., Nathan Koppel, *Hello, I Must Be Leaving*, AM. LAWYER, March 2005.

58. See, e.g., *id.* (“Each of [the ten profiled firms] have lost at least 18 percent of the partners they hired between the fall of 1999 and fall of 2003.”).

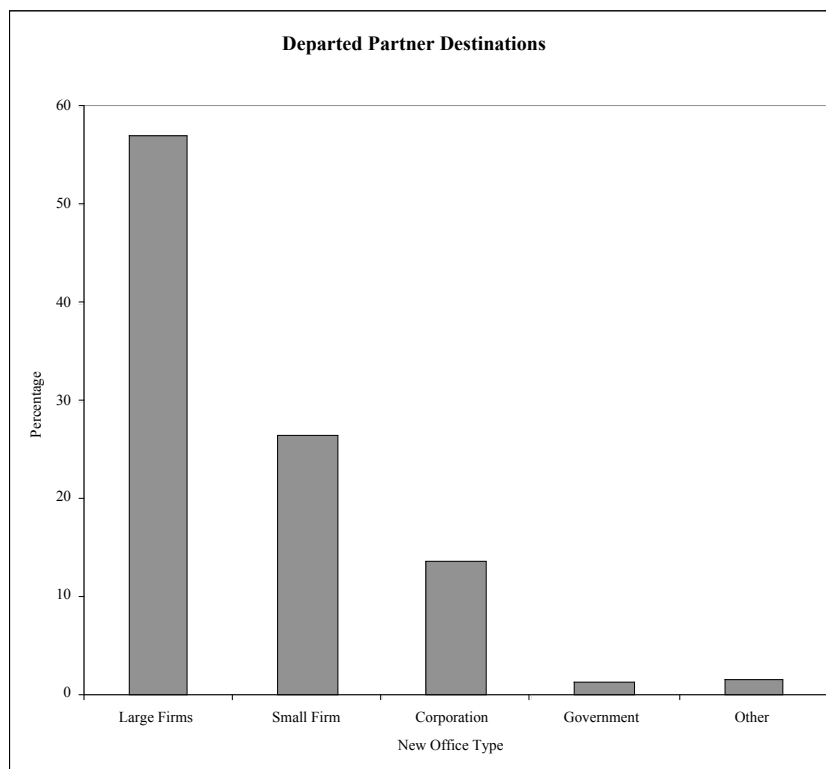


FIGURE 11. PARTNER DESTINATIONS AFTER DEPARTING AM LAW 200 FIRMS

Figure 11 indicates that law firms were the overwhelming destination of recently-departed partners.⁵⁹ Interestingly, however, nearly 30 percent of these partners departed relatively large *American Lawyer* 200 firms for far smaller firms. Relatively few partners, this analysis reveals, depart large firms for positions in government. Overall, our analysis of this data indicates that, on average, 5.8 percent of major firms' partner base can be expected to depart the firms each year.⁶⁰ Although this assessment provides unusually specific detail with respect to departed partner destinations, however, its

59. This analysis is drawn in part from Koppel, *supra* note 57, tbl.1. We drew this analysis from data about partners' destinations included in this survey and assessed the most common destinations in percentage terms. We recognize, however, that this data set is drawn from the group of law firms with the highest fraction of departing partners, creating some potential selection bias. This only highlights, however, the lack of probative empirical research on these important questions.

60. Note that our analysis of this data required us to exclude partners that departed Pennie & Edmonds, whose 92 percent partner departure rate would be deceptive in view of the fact that the firm dissolved in 2004.

usefulness may be limited by the lack of a comparison analysis with respect to associates' destinations when departing major firms.

D. The Limits of Anecdotal Analysis of the Effects of Attorney Career Paths

This Part has provided a synthesis of available empirical analysis of attorneys' careers in an effort to set forth the basis for testable hypotheses regarding the link between lawyers' career decisions and the provision of pro bono service in the United States. We should emphasize, however, that reliable and useful data characterizing this critical factor in pro bono service is surprisingly rare. As we have noted, even the data identified here has significant limitations in its use to study the link between pro bono and modern attorneys' careers.

The dearth of helpful analysis on this point is driven principally by the fact that much analysis of lawyer turnover is dedicated to retelling of individual firm anecdotes rather than empirical study of broader trends in the profession.⁶¹ Indeed, most studies dedicated to describing the relationship between lawyers' career decisions and pro bono services limit the scope of their analysis to the effects of this relationship on a single firm or attorney.⁶² Perhaps, then, the development of a series of empirically testable hypotheses is a prerequisite to closer empirical study of these important effects and their implications for pro bono policy. It is to this task that we now turn.

61. See, e.g., Jennifer Fried, *Hard Labor*, AM. LAWYER, Sept. 2003 (describing partner turnover at Littler Mendelson); Alan Jenkins, *Losing the Race*, AM. LAWYER, Oct. 2001 (describing African-American partner turnover at Cleary, Gottlieb, Steen & Hamilton); see also *supra* notes 35-36 and sources cited therein.

62. See, e.g., Elizabeth Amon, *Building a Better Model*, AM. LAWYER, Sept. 1, 2004 (describing the effect that the departure of a single attorney had on a major law firm's pro bono practice).

III. ASKING THE RIGHT QUESTIONS

The preceding two Parts presented what we know about pro bono practice in the United States, and what we know about the career path of American lawyers. To be sure, much of the data that is available is quite interesting and even informative. But if the relevant inquiry is whether we can arrive at an accurate description of the pro bono world, our analysis suggests that the available data's biggest contribution is to shine a spotlight on the fact that we don't know much at all. This Part is meant to put forth several unanswered questions that we believe to be important in understanding what is happening in pro bono practice but that cannot be answered with the currently available data.

As we noted in the Introduction, this is emphatically not a normative project. We are not interested in whether there is too much pro bono work or too little; whether for-profit firms are doing their part as good citizens of corporate America; or whether pro bono practice should be mandatory or voluntary. In fact, the reason we are not interested in these questions is because we have no way of answering them—we simply do not know enough about pro bono practice to even be able to begin making normative assessments. Our modest hope is that the questions we pose will spur others to undertake the studies necessary to answer them, and to help the legal community better understand the *status quo* of pro bono.

This Part will proceed in two sections. The first section will analyze data on pro bono discussed in Part I, above. The analysis in the second section will attempt to integrate the pro bono data in Part I with the career path information presented in Part II,

in the hope that we can better frame the inquiry that we believe is necessary to understanding the full pro bono picture.

A. Pro Bono Practice

The most obvious place to begin a critique of the available pro bono data is with the metric that is most often reported and discussed—hours-per-“pro bono attorney.” Despite the literature’s obsession with the number of hours lawyers spend on pro bono projects, this metric does not provide anything close to a complete picture of the pro bono world.

As we discussed in Part I, data with respect to pro bono hours is available across several metrics, including firm size, geography, and levels of experience. But we do not know many factors that would help us better understand the dynamics of pro bono practice.⁶³ For example, we have not found reported data relating to pro bono hours as a percentage of total hours worked. This information would be useful for several reasons. First, it would help us understand how pro bono work is prioritized in law practice relative to paid work. Second, it might shed better light upon the quality of work pro bono clients are receiving. An associate in a large firm may spend more hours on pro bono work than a small-firm associate, but if pro bono represents a smaller proportion of the total hours spent at larger firms than at smaller ones, we might come to the conclusion

63. In fact, our countless, repeated attempts to get our hands on raw data—*any raw data*—for this project has been a Sisyphean enterprise of the first order. The National Association for Law Placement (NALP) Foundation for Career Research and Education, which purports to be “your source for reliable, practical, affordable research and education on lawyer careers and the law as a profession,” has been nothing if not impossibly obdurate and unhelpful. Though many “researchers” (including the President of NALP and the Research Director for AFTER THE JD, *supra* note 4) were willing to point us to the NALP Foundation’s website, www.nalpfoundation.org, none was able or willing to provide us with any of the information we requested. In light of our difficulties, it is not hard to understand the dearth of understanding of the empirical realities of pro bono practice.

that the large-firm associate is giving her pro bono clients a relatively lower level of attention compared to her small-firm peers.⁶⁴ Along the same lines, it would be valuable to know the proportion of total revenues to expenditures on pro bono matters (including the foregone billable hours of attorneys' time dedicated to pro bono). We know that big firms devote more hours-per-attorney to pro bono practice. But a better proxy for firmwide dedication to pro bono is the ratio of revenues to pro bono (or perhaps billable hours to pro bono hours) because these metrics reflect the real, tangible, and quantifiable cost to the firm of its pro bono contributions.

Further, although data is available to show us how pro bono participation varies with legal experience, it only tells us the percentage of lawyers at each experience level that participate in pro bono.⁶⁵ The data tells us that pro bono participation remains relatively steady across experience levels, but it does not tell us how many hours are being put in by lawyers across different experience levels. It seems quite obvious that a more complete understanding would at least necessitate an analysis of the average number of pro bono hours worked varied by experience levels. It may well be the case that the most experienced lawyers often “participate” in pro bono by bringing in a client and then assigning all the work to subordinates. If the quality of legal work generally is correlated to experience level—a fair assumption—such a state of events would imply that the actual legal representation that pro bono clients receive is of generally lower quality than we might have expected given the data.

64. Of course, this observation assumes that the marginal rates of productivity for associates in small and large firms are equal, and this assumption may well be incorrect. *See supra* Part I, Figures 2 and 3. Further research and the imposition of quality controls would be required to monitor the quality of pro bono outputs—but it seems that the question of pro bono hours as a percentage of total hours worked is logically antecedent to the question of the quality of work performed during those hours. The need for simplifying assumptions like this provides further evidence for how underdeveloped the empirical pro bono literature remains.

65. *See supra* Part I, Figure 4. We assume here that age is highly correlated with legal experience.

Another problem with the available data is that we have no idea how pro bono hours are allocated across different types of projects. For example, we have no way of knowing the proportion of total pro bono hours spent on, say, landlord-tenant disputes, corporate work for nonprofit organizations, or death penalty cases. While we do not presume to create a hierarchy of value between different sorts of matters, it is probably fair to say that an hour of landlord-tenant work is different from an hour of death penalty work, and is very different from an hour of corporate work for a nonprofit client. And it also seems fair to suspect that a community with many landlord-tenant disputes is ill-served by large, well-heeled law firms that take a disproportionately large number of death penalty cases.⁶⁶

Thus, the flawed data regarding pro bono hours further leads to a lack of understanding to serious questions about the extent to which pro bono is *bona fide pro bono publico*, which supposedly, should meet the needs of the *public* first and the firm second. Related empirical problems arise from the fact that we have no way of knowing how lawyers get their pro bono work. How much of the pro bono work is brought in through relationships with public interest organizations, through court appointments, through active efforts made by the firm or lawyer to find (and fill) unmet needs in the community? In contrast, how much of the pro bono work simply reflects the attorney's willingness to provide favors for his or her friends or family? Of course, gathering this kind of data would be time-consuming and difficult. Indeed, the obstacles for obtaining it

66. There is good reason to suspect the presence of this disjunction between the cases that firms take and the cases that their communities need. *See, e.g.,* Braverman, *Why Washington?*, *supra* note 33 (describing various high-profile cases taken by large law firms, such as Arnold & Porter and Covington & Burling, at the expense of helping out the local legal aid clinic); Donna St. George, *Starr, in New Role, Gives Hope To a Needy Death Row Inmate: Jury Not Told All in Va. Slaying, Famed Lawyer Says*, WASH. POST, Mar. 14, 2005, at A01 (describing the pro bono involvement of Kirkland & Ellis and Kenneth Starr in a high-profile death penalty case).

might be overshadowed only by its usefulness—with this data, we could measure the extent to which pro bono hours are being spent on matters that are serving the actual needs of the community, as opposed to using pro bono as a ploy for prestige (*e.g.*, a way to get at more appellate or Supreme Court litigation⁶⁷) or as a recruiting tool (*e.g.*, higher rankings in the “Am Law 100” means more public-minded recent law school graduates who are willing to come and work on your telecom projects so that they can get that cool death penalty case).⁶⁸ A more nuanced and more helpful analysis requires data that reports pro bono practice according to geography and firm size, which would allow us to make much more educated guesses about the responsiveness *vel non* of different types of firms and lawyers in different legal markets, in light of the actual needs of the communities that require their services.

Along these same lines, the needs of different communities in different regions of the country may vary greatly.⁶⁹ Clearly, different parts of the country have different pro bono needs, both in terms of the actual amount of representation required and the type of legal representation needed. Even a rudimentary understanding of pro bono practice in the United States necessitates a study of regional differences in both quantity and type of pro bono services. While there is data available with respect to how many hours are

67. See, *e.g.*, Linda Greenhouse, *Court Upholds Tribal Power It Once Denied*, N.Y. TIMES, Apr. 20, 2004, at A12 (describing the pro bono involvement of McDermott Will & Emery and one of its partners, James E. Smith, who argued before the Supreme Court of the United States on behalf of Billy Jo Lara, an indigent member of the Turtle Mountain Band of Chippewa Indians to define the limits of tribal sovereign power); see also McDermott Will & Emery, Press Release, Pro Bono Supreme Court Appearance, Feb. 23, 2004, available at www.mwe.com/index.cfm/fuseaction/media.prdetail/object_id/6e9af916-cdc2-45dc-af25-feed3c9293bc.cfm (trumpeting the firm’s pro bono efforts in the case) (visited Apr. 29, 2005).

68. See, *e.g.*, Arnold & Porter, Press Release, A&P Wins 2004 American Bar Association Pro Bono Publico Award, available at www.arnoldporter.com/recruiting.cfm (visited Apr. 29, 2005).

69. It is interesting to note that in its reporting on the financial performance of law firms, the American Lawyer routinely provides exhaustive analysis of the reasons for regional disparities in metrics such as “revenue-per-lawyer.” See, *e.g.*, Karen Dillon, John E. Morris, & Emily Barker, *Older and Wiser*, AM. LAWYER SUPP. (Am. Law 100 Report), Aug. 1, 1996, at 13-21 (providing a tediously in-depth discussion—which tallies 5,341 words over 8 pages—of the possible causes of differences in financial performance across regions in the United States).

spent in different regions of the country,⁷⁰ we do not know whether the geographic variation in pro bono corresponds well to the needs of each geographic region.

One useful starting point to fill this gap might be to compare those numbers to some metric that might serve as a good proxy for how much pro bono work is needed in the community (*e.g.*, the percentage of the population living at or below 150 percent of the poverty level). But even then, we would not have the whole picture because we have no way of knowing whether a lawyer in, say, New York, is spending her pro bono hours on New York matters or whether she is representing far-away pro bono clients.⁷¹ A more thorough understanding would necessitate knowledge not only of where pro bono work is being done, but also where its beneficiaries are.

Finally, the current state-by-state data on pro bono practice makes sweeping geographic generalizations.⁷² These data are both too narrow and too broad to be useful: as we have already emphasized, they are too narrow to paint a full picture of the pro bono needs that presumably vary by region, and they are too broad to paint a sufficiently granulated picture of the extent to which those needs are (or are not) being met. A full understanding requires a significantly more localized analysis of pro bono services. Pro bono practice in New York City is not the same as practice in Goshen, New York—and a simple statewide aggregation of pro bono “hours” obscures the important differences between the state’s constituent communities.⁷³ It may well be the case, for example, that pro bono practice thrives in small towns (such as Goshen) because of a sense of community—and a familiarity with local pro bono needs—that does not exist in the

70. *See supra* Section I.D.

71. *See also supra* note 31, and accompanying text.

72. *See supra* Section I.D & Figure 5.

73. *Cf.* ABA, STATEWIDE PRO BONO, *supra* note 32.

larger markets (such as New York City). Such small town pro bono practice may be more effective for the needs of the community even if less “hours” are spent on it,⁷⁴ but such a hypothesis will remain just that—a hypothesis—until empiricists start asking the right questions (and measuring the right answers) about pro bono practice.

B. The Full Picture

The previous section has shown that there is much to be desired in our descriptive understanding of pro bono practice in the United States. This section will strive to show that our lack of understanding is even deeper by adding another layer onto the analysis—the interaction between attorneys’ career paths and pro bono services.

As we have mentioned, the brunt of pro bono work is done by young associates, especially at large firms.⁷⁵ Further, Part II demonstrated that, although detailed data is not available, many lawyers tend to switch jobs early in their careers. These dynamics may have a serious impact upon pro bono practice. Most importantly, we might expect that these career path phenomena imply serious consequences for the quality of pro bono service that is actually provided.

Assuming that less experienced lawyers generally produce lower-quality work (or at least that the quality-per-hour ratio is lower for less experienced lawyers),⁷⁶ the most obvious inference from the fact that most pro bono work is done by young lawyers is that the bulk of pro bono work is generally lower in quality than would be the case if more pro bono service was being provided by more experienced attorneys. But the fact that

74. See, e.g., Elisabeth Preis, *A Small Victory*, AM. LAWYER, July 1, 2001 (baldly offering a similar hypothesis).

75. See *supra* notes 28, 35, and accompanying text.

76. See also *supra* note 64.

young lawyers are now likely to leave their first jobs earlier (and more often) than ever before, may also have serious consequences for pro bono quality. For example, when young lawyers leave their first jobs, we have no idea where they are likely to go. Are they going to a similar type of employer? Are they staying within the same region?

The answers to these questions carry important implications for our understanding of pro bono practice. For example, we know that large firms in large urban areas experience the highest rates of turnover amongst young associates.⁷⁷ We also know that large firms, on average, provide more hours of pro bono service than smaller ones.⁷⁸ Thus, if young lawyers are leaving large firms for other large firms, then they might be able to continue their commitment to pro bono and, as they get more experience, will likely provide higher quality pro bono services. But if these young lawyers are moving to an environment that is less accepting of pro bono service (*e.g.*, midsize firms or the general counsel's office of a corporation), then the lawyer will be less likely to apply his or her ever-increasing experience to pro bono work.

Even if we did have the data relating to where young lawyers go when they leave their firms, we would still need more information to gauge how the quality of pro bono work might be affected by trends in career paths. One particularly important set of data that is currently unavailable is the amount of pro bono work done by lateral hires relative to their peers that have not left their employers. If laterals are doing less pro bono work, then it should follow that young attorneys that leave their original employer (even those that move between firms at which there is an equally high commitment to pro bono) do

77. See AFTER THE JD, *supra* note 4, at 53; see also *supra* Section II.A.

78. See *supra* Section I.B., Figure 2 & Figure 3.

less pro bono work than they would if they stayed.⁷⁹ The empirical veracity of this hypothesis implicates the general quality of pro bono services because it suggests that more experienced lawyers do less pro bono work on account of their lateral mobility. Of course, one can imagine alternative scenarios (under which lateral hires do more or the same amount of pro bono as non-laterals).⁸⁰ Since we cannot make a best guess at the answer to this question, significant empirical analysis is required to understand how changing career paths affect the quality of pro bono service provision.

A further major effect of career path trends on a descriptive account of the quality of pro bono services is how employers and lawyers themselves experience pro bono work toward the beginning of their careers. We currently have no way of knowing, for example, whether employers and young lawyers treat pro bono work as an end in itself or as a training tool.⁸¹ It may well be the case that pro bono work early in one's career is seen as a substitute for formal training, such as workshops by the Institute for Trial Advocacy, which many firms sponsor as a means of offering training to junior associates. This may well explain why pro bono hours seem to be weighted toward younger lawyers.

79. The theoretical plausibility of this possibility is relatively simple. Laterals who are hired into a new firm environment are relatively less acquainted with their new employer—and if pro bono is largely understood to be discretionary and/or optional, then an over-worked new hire is likely to cut his or her pro bono commitments in an effort to devote more time and energy to relatively more “important” responsibilities.

80. For example, one can imagine that laterals do the same amount of pro bono work as their similarly experienced coworkers because pro bono commitments could be tied to the number of years that have elapsed since an attorney graduated from law school. Alternatively, one can imagine that laterals are treated like new hires—and a firm's pro bono assignments could be tied to the number of years that have elapsed since the attorney joined the firm. The rationale for this possibility could stem from the hypothesis that firms tend to use pro bono work like real-life training opportunities, and because pro bono can be a tool for introducing young lawyers to the firm's way of doing business (e.g., brief writing, negotiations, trial techniques—all of which vary from firm to firm), laterals could be tasked with higher levels of pro bono work than attorneys with similar levels of post-law school experience who have never made a lateral career move.

81. Anecdotal evidence exists to suggest the latter proposition is prevalent. *See, e.g.*, Karen Hall & Dan McAllister, *Corporate Crusaders*, AM. LAWYER, Dec. 1, 2000 (“Business development aside, firms bank on pro bono work as a key to associate recruitment, retention, and training.”).

It may also explain why young lawyers at large law firms, who perform more pro bono work on a per-hour basis than their smaller-firm peers,⁸² are also more likely to leave their place of employment early in their careers.⁸³ Again, we do not know where these people go, but if they are moving to a practice setting in which pro bono practice is deemphasized, the availability of pro bono matters as a training tool may provide a partial explanation (along with somewhat higher pay, more identifiable credentials, and other potentially relevant criteria). If it is the case, however, that young lawyers and their employers view pro bono work as a training tool, we are presented with a troublesome portrait of pro bono practice. If most young attorneys are not committed to the provision of much-needed legal services but rather to train themselves to thrive in their for-profit work, we again face the prospect of inexperienced lawyers providing the bulk of pro bono services without continuing their commitment as they gain experience. This, in turn, paints a disheartening picture of the general quality of the pro bono services that are currently available in those places in which the most pro bono hours are logged (large firms).

Further, and in a similar vein, we have no data regarding whether pro bono hours are generally treated as a supplement or a substitute for regular requirements of billable hours. One can imagine quality suffering if pro bono providers are overworked. Moreover, it is easy to imagine that junior attorneys who are forced to carry the normal workload on top of their pro bono obligations will eventually become burned out—and pro bono (not the billable hours) will be the first casualty. But maybe even more crucial to the picture is the prospect that young lawyers are committed to pro bono practice when

82. *See supra* Section I.B, Figure 2, & Figure 3.

83. *See supra* Section II.A.

they begin their careers but end up either leaving those firms in which the most pro bono opportunities are available because of burnout (and going to places where pro bono is less emphasized) or staying in their jobs but decreasing the amount of pro bono work they do as they get closer to partnership and billing pressure increases.

When the (admittedly scant) pro bono data is layered on top of the (also admittedly scant) career path data, we are left with a more pessimistic picture of pro bono than the pro bono data alone would suggest. Notwithstanding the *American Lawyer's* emphasis to the contrary, the plurality of young lawyers begin their careers with mid-sized firms,⁸⁴ which are also the least likely environments for pro bono practice.⁸⁵ When combined with the fact that lawyers are most likely to participate in significant pro bono practice when they are young and relatively inexperienced,⁸⁶ the implications are troublesome—most young attorneys are beginning their careers in those practice settings that are *least* likely to expose them to a significant amount of pro bono work, and (if pro bono proclivities decrease with experience) they will never be more likely to participate in pro bono practice. It may well be the case that lawyers that are not exposed to pro bono work early in their careers are not likely to hold that commitment as they become more experienced. This hypothesis, if true, poses serious problems for any descriptive or normative theory of American lawyers' commitments to *pro bono publico*.

CONCLUSION

This project was meant mainly to bifurcate the world into what we know and what we do not know about the provision of pro bono services by the private bar in America.

84. See *supra* Section II.A. & Figure 7.

85. See *supra* Section I.B., Figure 2 & Figure 3.

86. See *supra* Section I.C., Figure 4; see also *supra* notes 28, 35, and accompanying text.

When we started, we had a hunch that the latter would swamp the former. Unfortunately, we have not been surprised. While there are numerous hortatory, self-congratulatory, and anecdotal “reports” about the state of pro bono practice in the United States, a comprehensive and analytically sound treatment of the field continues to escape us. As a consequence, the legal community’s ability to achieve descriptive accuracy, to issue sound normative judgments, and to develop a comprehensive reform strategy for the future all remain crippled by the tremendous amount that we do not know, both with respect to the available pro bono data and its relationship with the ever changing career paths of American lawyers. The purpose of this project has been to point out major flaws and holes in our collective understanding, and to pose questions that must be answered and hypotheses that should be tested in the course of performing informed analyses of pro bono practice. We humbly hope this project will contribute to framing a platform for reform grounded in empirical fact.